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January 10, 2018

Via Hand Delivery

Hon. Alvin K. Hellerstein
United States District Judge
United States District Courthouse
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007

Re: *Washington, et. al. v. Sessions, et. al., 17-cv-05625 (AKH)*

Dear Judge Hellerstein:

We represent the plaintiffs in the above-referenced lawsuit. We write in response to the letter submitted Monday by Samuel Dolinger on behalf of the defendants.

By his letter, Mr. Dolinger contends that the decision by defendant Jeff Sessions to issue a memorandum purporting to rescind the Cole Memorandum (“Sessions Announcement”) constitutes a “significant development” in this lawsuit. Mr. Dolinger is wrong. As discussed below, the Sessions Announcement constitutes nothing other than an empty and disingenuous response to the arguments submitted on behalf of plaintiffs in opposition to defendants’ motion to dismiss.

As the Court will recall, we argued that the Federal Government had ceded the issue of national Cannabis drug policy to the States. As evidence of the foregoing, we referenced, *inter alia*, a series of Justice Department memoranda, including the Cole and Ogden Memoranda, as well as the FinCEN Guidance, pursuant to which the Department of the Treasury advised banks and other federally-regulated lending institutions on how to transact with Cannabis businesses – activities which would be illegal under the Controlled Substances Act (“CSA”).

In addition, we relied upon other evidence, including, *inter alia*, the Rohrbacher-Blumenhauer Amendment (previously known as Rohrbacher-Farr Amendment) (collectively, the “Funding Rider”) to the Omnibus Federal Appropriations Bill pursuant to which Congress *de-funded* the Justice Department and Drug Enforcement Administration (“DEA”) from targeting, investigating and/or prosecuting medical Cannabis businesses, physicians and patients who act in compliance with State-legal Cannabis programs. We also referenced, among other things, the U.S. and International Medical Cannabis Patents which the Federal Government has licensed to companies around the

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world to develop medicines which would be illegal under the CSA. And we pointed out that the U.S. Government has been subsidizing medical Cannabis through its Investigational New Drug Program (“IND Program”) since 1978, cultivating, distributing and otherwise providing medical Cannabis to patients all over the Country. All of the foregoing evidence, among other things, was presented to this Court against a background that includes the existence of 30 State-legal medical and recreational Cannabis programs throughout the Nation – programs which would not and could not exist in the absence of acquiescence by the Federal Government. At this point, more than 65% of the United States population lives in a jurisdiction that allows regular access to Cannabis (medical and recreational).

Now, defendant Sessions, less than a week after defendants submitted their reply on the motion to dismiss, has suddenly decided, without any warning or explanation, that the Cole Memorandum is rescinded. And Mr. Dolinger contends that this rescission is “relevant to Defendants’ pending motion to dismiss.” How convenient.

A careful reading of the Sessions Announcement confirms that it was prepared and issued for *Your Honor’s* consideration – not for that of U.S. Attorneys around the Country – and that it constitutes an empty vessel. *First*, the Sessions Announcement does not establish and/or otherwise reflect a change in policy (and, as discussed below, it could not legally do so). Rather, in his Announcement, Sessions makes clear that he views the Cole Memorandum to have been unnecessary, and that he (Sessions) is supposedly merely continuing the general principles that have guided the Justice Department since 1980. In this regard, the Sessions Announcement states:

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded ...

See Sessions Announcement, Ex. A to Mr. Dolinger’s Letter. Thus, although rescinded, the Cole Memorandum and the principles underlying it, which according to Sessions, merely reflected existing policy, remain intact and in full force and effect.

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Second, in his Announcement, defendant Sessions contends that the classification of Cannabis reflects "Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime." That assertion -- again, plainly an effort to influence this Court's deliberations -- is laughably false. The best evidence of the intentions and determinations of Congress is the Funding Rider, which, as set forth above, expressly prohibits the Justice Department and DEA from enforcing the Controlled Substances Act ("CSA") as it pertains to the classification of Cannabis as a Schedule I drug, unless such activities are inconsistent with State-legal Cannabis programs. Indeed, nothing could more clearly reflect Congress's intent, as it pertains to Cannabis and the CSA, as a law that expressly prohibits defendant Sessions from making the sort of change his Announcement purports to threaten, but which plainly doesn't.

Third, since the Sessions Announcement, members of Congress of all political stripes have reacted with outrage, with several members of the House of Representatives calling for defendant Sessions to be ousted from his position as Attorney General precisely because he has threatened to act inconsistently, not only with the Funding Rider, but also with the principles of States' Rights which he has long purported to support. It is also worthy of note that, on the day of the Sessions Announcement, Representative Blumenhauer stated that the Funding Rider enjoys "unprecedented support" by Democrats and Republicans alike, in both the House and Senate, and that he is "confident" that it will be extended in the future and enlarged to include the "full range" of all State-legal Cannabis activities.

We trust that the Court will see right through defendant Sessions' improper effort to change the direction of this lawsuit, by means of an Announcement that (i) does not change federal policy, (ii) cannot change federal policy (since Congress has de-funded any effort by defendants to reorient their enforcement priorities), and (iii) has been almost universally condemned by the very legislative body Mr. Dolinger claims supports defendants in this lawsuit.

Thank you for your consideration.

Respectfully submitted,



Michael S. Hiller (MH 9871)

MSH:me

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